SUPERIOR COURT OF THE STATE OF DELAWARE

RICHARD F. STOKES

JUDGE

SUSSEX COUNTY COURTHOUSE 1 THE CIRCLE, SUITE 2 GEORGETOWN, DE 19947 TELEPHONE (302) 856-5264

February 26, 2014

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RE: Angeline M. Solway v. Kent Diagnostic Radiology Associates, P.A., Michael Polise, D.O., Martin G. Begley, M.D., Thomas Vaughan, M.D., Raphael Caccese, Jr., M.D., Bayhealth Medical Center, Inc. d/b/a Kent General Hospital, Carlos A. Villalba, M.D. and Inpatient Services of Delaware, P.A. C.A. No. S11C-01-022 RFS

Dear Counsel:

Before the Court is the Motion *in Limine* of Plaintiff Angeline M. Solway ("Solway") to Exclude the Expert Testimony of Douglas G. Smith ("Smith"), an expert witness of Defendants Kent Diagnostic Radiology Associates, P.A. ("KDRA"), Thomas Vaughan, M.D. ("Dr. Vaughan"), Martin Begley, M.D. ("Dr. Begley"), and Raphael Caccese, M.D. ("Dr. Caccese")¹ (collectively "the Radiology Defendants").

¹ On February 17, 2014, on the Radiology Defendants' Motion to Continue Trial, the Court ruled that if Solway dismissed her claims against Dr. Caccese, the pending trial in this

This Motion is **DENIED**.

This is a medical malpractice case in which Solway alleges that she received negligent care rising to the level of punitive conduct from a host of physicians at Bayhealth Medical Center's ("Bayhealth's") Kent General Hospital ("Kent General") in Kent County, Delaware from Monday, January 26, 2009 to Monday, February 2, 2009. Despite subsequent care she received at Christiana Hospital's ("Christiana") Christiana Care Health Services from February 2, 2009 to Tuesday, February 17, 2009, Solway was rendered a functioning paraplegic.

In its memorandum opinion denying the Motion for Partial Summary Judgment of the Radiology Defendants² on the claims of Solway, the Court extensively laid out the facts of this case.³ As this litigation deals with one set of factual circumstances, the Court will not repeat those facts.

Solway sought leave to file Second Amended Complaint to add punitive claims against both the Radiology Defendants and Defendant Carlos A. Villalba, as well as a direct claim against KDRA. On February 26, 2013, the Court granted Solway's

matter will proceed as scheduled.

² Dr. Caccese was not a party to the Radiology Defendants' Motion for Partial Summary Judgment.

³ *Solway v. Kent Diagnostic Radiology Assocs., P.A.*, C.A. S11C-01-022 (Del. Super. Feb. 18, 2014) (denying the Radiology Defendants' Motion for Partial Summary Judgment).

Motion. On April 5, 2013, the Court entered an Order setting May 15, 2013 as the deadline for all defendants to identify all expert witnesses regarding Solway's punitive claims and produce any related reports. A similar deadline for July 3, 2013 was set for Solway. Also, the Order set September 16, 2013, October 15, 2013, and November 12, 2013 as the respective deadlines for filing opening, answering, and reply briefs for Dispositive Motions and Motions *in Limine*.

On May 15, 2013, the Radiology Defendants filed Supplemental Expert and Witness Disclosures under this Court's Civil Rule 26(b)(4). In these disclosures, they identified Smith, listed the materials which he reviewed, and explained how Smith came to his conclusions:

Douglas Smith performed an analysis to ascertain the production volume metrics of Kent Diagnostic Radiology Associates (KDRA) in 2008 and 2009, and to see if those metrics varied from other reasonably similar providers of diagnostic imaging professional services. Mr. Smith will explain the process of this evaluation, and the data sets he obtained and compared. Mr. Smith will testify about his findings, including that in 2009, KDRA procedure production was either average, or slightly below average, when compared to similar groups. He will also testify that KDRA's ratio of work relative value units to procedures performed for 2008 and 2009 fall slightly below the average of all practices [in] the comparison groups, and well below the Medical Group Management Association 2009 Physician Compensation and Production Report and the American College of Radiology Radiologist Production Report. Mr. Smith will also testify about the effect of modality mixed contributions to the Physician Production Metrics. Mr. Smith will testify that based upon his analysis, it cannot be concluded that the KDRA Physician Production was extraordinarily greater than similar private practice radiology groups. Mr. Smith will rebut the opinions of Plaintiff's expert(s), including Dr. Hornberger. Mr. Smith reserves the right to supplement his opinions should additional information become available.⁴

On September 16, 2013, Solway filed the present Motion. The Radiology Defendants filed their answering brief on October 15, 2013. Solway filed her reply brief on November 22, 2013.

Solway alleges two principal arguments: (1) that a *Daubert* hearing should be granted regarding whether Smith's opinion is unreliable and untrustworthy; and (2) that an evidentiary hearing should be granted to determine whether the Radiology Defendants engaged in discovery violations and, if so, the nature of those violations.⁵ The Court addresses Solway's second argument first. Solway's opening brief, in which she asserted that she could not effectively cross-examine Smith due to supposedly missing information, did not specifically allege that the Radiology Defendants committed any discovery violations. The Court, therefore, dismisses any

⁴ Supplemental Rule 26(b)(4) Disclosure at 9–10 (May 15, 2013).

⁵ Solway also makes a hearsay argument, stating that Smith relied upon hearsay, and hearsay within hearsay. The Radiology Defendants contend that, apart from relying on information reasonably relied upon by others in his field, Smith relied on material to which there has been no challenge regarding accuracy or validity. Solway counters that she does challenge reports, and notes that they were not provided to her during discovery.

The Court does not understand this hearsay argument from either side. If the parties are trying to argue that Smith relied on impermissible material in forming his conclusions, that argument must fail. *See* D.R.E. 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.").

such allegations.6

Regarding Solway's first argument, which is more fleshed out in her reply brief but nonetheless raised in her opening brief, she asserts that Smith's principal conclusion that KDRA's workload was not abnormally large due to the fact that KDRA did not interpret more imaging studies than other private radiology groups within the relevant time frame rests on four classes of unreliable, untrustworthy, and undisclosed data.⁷ The first class consists of a set of documents and data which was provided to Smith by his own company. Solway claims that it is impossible for her to verify this material without the underlying source information, which she claims she requested during discovery and which the Radiology Defendants not only failed to produce, but denied existed. The second class is the draft Pearson Report.⁸ As a

⁶ See, e.g., In re Absbestos Litig., 2012 WL 2389898, at *1 (Del. Super. June 22, 2012) (stating that, in the context of motions for summary judgment, defendants may not add arguments after filing their opening briefs (citations omitted)).

⁷ The Radiology Defendants argue that Solway had all of the information upon which Smith based his conclusions, except the identities of the comparison radiology groups that Smith examined, which the Radiology Defendants claim can be made available. Solway's attempt to somehow infer that the Radiology Defendants or Smith did not provide any requested information is, they claim, patently, false.

⁸ Although referred to as a "draft," this is assumedly the same Pearson Report referred to in the Court's memorandum opinion denying the Radiology Defendants' Motion for Partial Summary Judgment. *See Solway v. Kent Diagnostic Radiology Assocs.*, *P.A.*, C.A. S11C-01-022, at 14–15 n.24 (Del. Super. Feb. 18, 2014). The Radiology Defendants note that Solway has not asked Bayheath if a final Report existed, nor has she indicated that the Report, going from final to draft, was altered.

draft study regarding a hospital other than Kent General, which Solway notes was not timely disclosed, Solway claims that there is no reason to accept the accuracy or reliability of the Report's information. The third class is the underlying data that Smith used to compile his conclusions about the comparable radiology groups. Although the Radiology Defendants state that they will provide the identities of those groups to Solway, subject to an existing protective order for confidential information, Solway counters that the identities themselves are useless. Rather, she argues that she needs the underlying data regarding how Smith compiled the workload information and what it demonstrated. The fourth class consists of various national reports on various radiology work volumes. She argues these reports have not been provided.

The Court finds that under the various tests regarding the admissibility of expert witnesses, Smith's opinions are admissible. Solway's claim for punitive damages is based, in part, on the premise that KDRA, in a motivation to increase profits, failed to adequately staff enough radiologists at Kent General. Smith's role in this litigation, therefore, is to opine on the amount of images which KDRA interpreted as a whole, and each of its radiologists interpreted individually, as

⁹ See State v. Salsky, 2013 WL 5487363, at *24–26 (listing the *Daubert* factors and the additional five-step test this Court uses when determining the admissibility of an expert).

¹⁰ The Radiology Defendants argue that this is a baseless assertion, as none of Solway's experts have reached such a conclusion. Solway counters that expert testimony is not necessary to reach this conclusion.

compared to other private radiology groups. Furthermore, Smith seems to serve as

the foil to Solway's expert Dr. Keith Hornberger, discussed in prior opinions. Thus,

it is clear that Smith's opinions are relevant to this case. Additionally, as the

managing partner of a health care consulting firm, Smith seems to have the requisite

degree of knowledge in his field. His testimony will also assist the trier of fact in

determining an important issue in this case. The Court also does not find the material

upon which Smith relied to be inherently unreliable or untrustworthy.

The only issue that gives the Court pause is the notion that Solway does not

possess all that she needs to effectively cross-examine Smith. Therefore, in denying

this Motion, the Court directs that Solway be given any information relative to

Smith's report she may require. Solway is instructed to prepare an exact description

of what she needs from the Radiology Defendants directly, or what is within the

Radiology Defendants' control.

Based on the foregoing, this Motion is **DENIED**.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Dennis D. Ferri, Esq.

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